NO. 47212-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCBEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Edmund Murphy, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

To the extent that defense counsel invited error[1] by failing to request a Petrich[2] instruction to ensure jury unanimity, did counsel provide ineffective assistance, denying the appellant a fair trial?

Issue Pertaining to Supplemental Assignment of Error

Did trial counsel's failure to request a Petrich instruction as to the charge relating to Debbie Headland constitute ineffective assistance of counsel, denying the appellant a fair trial?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The State has argued in its brief that this Court should not consider the appellant's jury unanimity argument because any error was invited by defense counsel at trial. Brief of Respondent (BOR) at 6-7. The following additional facts are necessary to fully evaluate the State's argument.

As to the jury instructions, defense counsel's main contention at trial was that the jury *should not* be instructed on transferred intent in the manner that the State proposed. E.g. 6RP 515-20; 8RP 697-712 (arguments that law did not permit transferred intent instruction as

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[1] As discussed below, the appellant disagrees that the error was invited.

[2] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), abrogated in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

proposed). The following exchange (set forth in the State's brief) occurred in the context of a colloquy regarding the transferred intent instruction:

> THE COURT: Would [the count relating to Debbie] require a Petrich instruction?
>
> [DEFENSE COUNSEL]: I wouldn't think so.

6RP 518-19.

This exchange is quoted in the State's brief. However, the State omits that the exchange immediately continued as follows:

> THE COURT: There is an allegation there was a shot fired at [Debbie] through the back door as well.
>
> [DEFENSE COUNSEL]: Yeah. One could argue conceivably you don't even need a transferred intent instruction here. The evidence is, as I see it, [McBee] walks up to Mr. Norman, points the gun somewhere at him and fires. Then he walks by the glass door and blows that out where Ms. Headland is. One could even argue . . . you don't even need the transferred intent. *If you give [the transferred intent instruction], I suppose you could give the Petrich instruction. I am not necessarily sure it is necessary.*
>
> My concern is giving the [transferred intent] instruction the way the State words [it], one, misapplies Washington and common law and, two, misunderstands there are three ways to commit assault . . . .

6RP 519. The colloquy continued as to the transferred intent instruction. 6RP 519-24.

C. SUPPLEMENTAL ARGUMENT

THE FAILURE TO REQUEST A PETRICH INSTRUCTION CONSTITUTED INEFFECTIVE ASSISTANCE DENYING THE APPELLANT A FAIR TRIAL.

1. As a preliminary matter, the error was not "invited" by defense counsel.

Preliminarily, in light of the full discussion that occurred at trial—not the snippet contained in the State's brief—McBee disputes the State's characterization of defense counsel's statements as invited error.

The "invited error" doctrine provides that a party may not request an instruction and later complain on appeal that the requested instruction was given. State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979) (citing Ball v. Smith, 87 Wn.2d 717, 556 P.2d 936 (1976); Vangemert v. McCalmon, 68 Wn.2d 618, 414 P.2d 617 (1966)). The doctrine has also been more broadly characterized as preventing an appellant from later asserting an error that he himself set up. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). For the doctrine to apply, the defendant must have "materially contribute[d]" to the error "by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." State v. Hockaday, 144 Wn. App. 918, 924 n. 5, 184 P.3d 1273 (2008).

Had the exchange occurred as presented in the State's brief, the State's argument regarding invited error might be more persuasive. But defense counsel's subsequent statements clarified that, while McBee was objecting to the State's proposed instruction on transferred intent, *if* such an instruction were given, a Petrich instruction might be appropriate. 6RP 519.

Far from leading the court down the path to error, defense's counsel's position was, at most, ambivalent. Particularly in this context—in which defense counsel was clearly far more focused on another argument—ambivalence is not tantamount to "setting up" an error.

The court had a duty to ensure that any conviction rested upon a unanimous jury verdict. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Moreover, defense counsel could not have anticipated that the State would not elect the act in closing argument. Brief of Appellant (BOA) at 12-13 (noting that prosecutor referred to two separate acts in closing related to Debbie, yet failed to "elect").[3] While the State attempts to argue the prosecutor "focused" on one act, the State also acknowledges there was argument regarding two separate acts. BOR at 8-9 (citing 8RP

[3] The brief of appellant contains a typographical error on the second line of page 13. It cites to "7RP 326." That citation should read "8RP 726."

726 and 8RP 731). Unlike the count involving Steve Norman, 8RP 740-41, the State did not elect the act it was relying on as to Debbie Headland.

In summary, the error was not invited because it was not set up by defense counsel. Rather, the court simply failed in its duty to properly instruct the jury, and, unlike the charge relating to Norman, the State's closing argument does not even attempt to elect which incident the State was relying on as to Debbie. As argued in the opening brief, defense counsel's mere failure to propose a Petrich instruction or object to its absence does not prevent the issue from being raised now; such an error may be raised for the first time on appeal. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

2. In the alternative, defense counsel was ineffective for failing to alert the court to the need for a *Petrich* instruction.

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, section 22. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) counsel's performance

was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869.

Defense counsel's performance fell below an objective standard of reasonableness. Under the circumstances, there was no reason not to insist that the jury be told it had to agree on the act constituting the assault of Debbie Headland. Counsel would have known that, if the jury settled on a lesser degree of culpability, transferred intent (from intended victim Kevin Headland to the others) would not apply to any of the separate shooting incidents. See BOA at 19-20.[4] Thus, counsel would have been aware that, based on the evidence at trial, his client faced an unconstitutional non-unanimous jury verdict if the jury was not instructed it had to be unanimous. Cf. State v. Carson, ___ Wn.2d ___, ___ P.3d ____, 2015 WL 5455671 at *4-7 (Sept. 27, 2015) (in case involving multiple counts

[4] The State argues in a footnote that, notwithstanding any jury instruction on transferred intent, RCW 9A.36.011 provides that any unintended victim is nonetheless assaulted if they fall within the terms of that statute. BOR at 11 n. 4 (citing State v. Wilson, 125 Wn.2d 212, 219, 883 P.3d 320 (1994)). However, RCW 9A.36.011 is the first degree assault statue. Wilson limits its analysis to that statute, which differs from the language of the second degree assault statute. In the case of second degree assault with a deadly weapon, the intended victim and the assaulted person are one and the same under the plain terms of the statute. RCW 9A.36.021(1)(c); CP 194 (to-convict instruction relating to Debbie Headland for lesser degree offense).

and multiple acts against one complainant, holding that counsel's explicit request that court *not* give a Petrich instruction, which was arguably more suited to a multiple acts case, was reasonable trial strategy, where counsel clearly articulated reason for not desiring such an instruction). It was, moreover, not reasonable to sit back and wait for the State to elect, given that the State was pursuing first degree assault convictions as to Steve Norman and Debbie Headland under a theory that McBee was simply continuing to pursue Kevin Headland. 8RP 727-28, 743 (closing argument advancing theory that shots were part of overarching pursuit of Kevin).

Prejudice exists where there is a reasonable probability that the result of proceedings would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. In his opening brief, McBee lists the reasons the Petrich error was not harmless. BOA at 23 (arguing jury could have harbored significant doubts about either incident). For similar reasons, there was a reasonable likelihood that that some jurors relied on one act and some jurors relied on another, depriving McBee of his right to a unanimous jury verdict.

McBee has shown both deficient performance and prejudice, and reversal of the Debbie Headland count is required.

D. CONCLUSION

For the reasons stated above and in Mr. McBee's opening brief, this Court should reverse the conviction and the corresponding enhancement relating to Debbie Headland.

DATED this 6TH day of November, 2015.

Respectfully submitted,

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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF NOVEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL McBEE
DOC NO. 222447
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF NOVEMBER, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 06, 2015 - 2:33 PM

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